Supreme Court, U.S.
FILED
07-626 NOV 9 - 2007
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No. 1

IN THE

Supreme Court of the United States

IN RE WESTBORO BAPTIST CHURCH, INC.;
FRED W. PHELPS; REBEKAH A. PHELPS-DAVIS; AND,
SHIRLEY L. PHELPS-ROPER

Petitioners,

On Petition for Extraordinary Writ
Of Mandamus and/or Prohibition
To the Honorable Richard D. Bennett,
United States District Court, District of Maryland
To the Honorable Todd Hutton
County Court Judge, Sarpy County, Nebraska
& To L. Kenneth Polikov,
County Attorney, Sarpy County, Nebraska

PETITION FOR EXTRAORDINARY WRIT OF MANDAMUS AND/OR PROHIBITION

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[November 9, 2007]

QUESTIONS PRESENTED FOR REVIEW

Is the level of restraint on speech, religious practice and expression by pending federal and state cases so substantial the Court should exercise its authority under the All Writs Act?

Does the verdict in the federal court for $10.9 million for picketing a funeral violate the First Amendment?

Does the verdict in the federal court for $10.9 million for picketing a funeral violate due process?

Is the Nebraska flag mutilation statute unconstitutional, on its face and as applied?

Are the state proceedings based on other Nebraska statutes, because of standing on the flag, unconstitutional?

PARTIES TO THE PROCEEDINGS IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

In *Snyder v. Phelps, et al.*, Case No. 06 CV 1389, in the United States District Court for the District of Maryland ("federal court case"):

Albert Snyder

Westboro Baptist Church, Inc.

Fred W. Phelps

Rebekah A. Phelps-Davis

Shirley L. Phelps-Roper

In *State v. Phelps-Roper*, Case Nos. CR 07 5060 and CR 075061, in the County Court of Sarpy County, Nebraska ("state court cases"):

State of Nebraska

Shirley L. Phelps-Roper

CORPORATE DISCLOSURE STATEMENT

There is no parent corporation to, or publicly held company owning 10% or more of the corporation's stock of Westboro Baptist Church, Inc.

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BELOW

The two decisions found on Westlaw where the court denied motions to dismiss and for summary judgment in the federal court case are:

Snyder v. Phelps, 2006 WL 3081106 (D.Md. 10/30/06)
Snyder v. Phelps, 2007 WL 3071412 (D.Md. 6/5/07)

The two verdicts issued in the federal court case on October 31, 2007, are found on Westlaw as follows:

2007 WL 3248911 (compensatory damages)
2007 WL 3248918 (punitive damages)

There are no opinions orders in the state court cases.

BASIS FOR JURISDICTION IN THIS COURT

Date of judgment to be reviewed:

In the federal court case the verdict at issue in this petition was rendered on October 31, 2007. The judgment order per Rule 58, Fed.R.Civ.P. was entered on November 5, 2007.

No order has issued in *State v. Phelps-Roper*, in the county court in Sarpy County (Papillion), Nebraska.

Date of order respecting rehearing:

Post-trial motions were filed in the federal court case on November 8, 2007.

Statutory provision believed to confer jurisdiction on this Court:

28 U.S.C. § 1651:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Every person against whom relief is sought:

Those persons against whom relief is sought are:

Federal court case:

Honorable Richard D. Bennett, Judge, United States District Court for the District of Kansas

State court case:

Honorable Todd Hutton, Judge, County Court, Sarpy County, Nebraska

L. Kenneth Polikov, County Attorney, Sarpy County, Nebraska

Why relief is not available in any other court

Adequate relief is not available in any court because the delay in obtaining decisive relief under the circumstances of these cases will have the practical effect of a de facto prior restraint. These cases were filed because of a desire to stop petitioners from picketing. The goal is to so embroil petitioners in litigation, and to obtain crippling judgments or convictions from impassioned jurors, so that petitioners are bankrupt and otherwise unable to picket.

In the federal case, the plaintiff and his counsel have been very vocal about their intent to use this verdict as precedent; to encourage others to file similar suits; and to use the multiplying of litigation to stop petitioners from picketing. In fact, since filing the case in June 2006, a Web page has been established at www.matthewsnyer.org for the purpose of soliciting funds, and encouraging others to file suit against petitioners.[1] Their public comments,

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[1] For examples of recent statements reflecting the intent to use litigation to stop the picketing, see, e.g., http://www.nytimes.com/2007/11/02/us/02protest.html?em&ex=1194148800&en=8865688cfcff00ab&ei=5087%0A: "If I can take whatever they have and stop them, good," said the father, Albert Snyder .... "I was not motivated by money. I want to shut this church down, if you can call it a church. I call it a cult or a hate group. I sat in that courtroom for a week and a half and never once heard them say a good thing about God."

like their comments during trial, are laced with religious hostility towards petitioners' religious beliefs and practices.

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http://www.abcnews.go.com/2020/story?id=3812344&page=1: "All I kept thinking about was my son Matt and all the other parents who went through it -- this will set a precedence [sic]."

http://www.ydr.com/newsfull/ci_7350265: "'This is going to bankrupt them, and that no other family will have to go through what we went through'."

"If they have no money, they might be able to walk to a funeral in Topeka, but they won't be able to fly to a funeral in Maryland or Pennsylvania," [plaintiff's counsel] said.

http://ap.google.com/article/ALeqM5iG5UJ5x50uIUmMI4flDQoqXca1ygD8SKT8Q00 & http://www.boston.com/news/nation/articles/2007/11/01/11m_verdict_in_funeral_protesters_case/: "The goal wasn't about the money, it was to set a precedent so other people could do the same thing," he said.

http://cjonline.com/stories/110207/loc_214323778.shtml: "[Plaintiff's attorney] said he would be speaking today to the family of another fallen serviceman whose funeral was picketed by Westboro Baptist.

http://www.ydr.com/newsfull/ci_7338894: "'Someone stood up to them,' Summers said. 'We hope that others will see that it can be done.'"

http://wjz.com/topstories/local_story_305145635.html: "The father asks that other military families who had protests by Westboro at the funerals of their children also sue to keep the church in court and in debt instead of picketing."

Similarly, the prosecutor in the state court cases has indicated his intent to use his prosecutorial power to stop the picketing, because of his disagreement with the content of the religious beliefs and expressions, including by proposing a city ordinance in addition to the existing state statute to put petitioners out of sight and sound.[2]

In *CBS, Inc. v. Davis*, 510 U.S. 1315, 114 S.Ct. 912, 127 L.Ed.2d 358 (1994), this Court stayed an injunction that a South Dakota state court had issued enjoining CBS's *48 Hours* from airing footage taken under cover in a meat-packing plant. The relief from this Court was based upon the All Writs Act, 28 U.S.C. § 1651:

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[2]For examples of the prosecutor's statements, see, e.g.,
http://www.lavistasun.com/site/tab3.cfm?newsid=18997805&BRD=2712&PAG=461&dept_id=559850&rfi=6: "Polikov ... said he's researching the law to come up with a draft ordinance that cities in Sarpy County might adopt.

'My goal would be you have to be out of sight, out of sound,' he said.

http://www.time.com/time/nation/article/0,8599,1679759,00.htmlPolikov knows he may have an uphill battle. Texas and U.S. Supreme Courts struck down laws that protect flag burning.

"'I think they hide under the protective veil of religion and politics to just to say the vile things they say,' said Polikov.

> For many years it has been clearly established that "any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity," 510 U.S. at 914, 114 S.Ct. at 1317. Justice Blackmon concluded "that the decision below conflicts with the prior decisions of this Court, that there is a reasonable probability that the case would warrant certiorari, and that indefinite delay of the broadcast will cause irreparable harm to the news media that is intolerable under the First Amendment," 510 U.S. at 915, 114 S.Ct. at 1318

A *literal* prior restraint has not been issued in this case. However, the practical impact of a $10.9 million verdict, with the plan for many more; and a pending criminal prosecution which patently conflicts with this Court's rulings about the use of the American flag for expressive conduct – all *designed* to embroil petitioners in litigation across the country so they will be restrained from picketing -- is the same as a literal prior restraint. Delay in relief will result in intolerable intrusions into First Amendment speech, expression, association and religious activities; and by the time the cases reach this Court through petitions for writ of certiorari the injury will be irreparable. This is particularly true where, as here, the government actions/regulations at issue are based on the content of the speech.

This Court has recognized the chilling effects of litigation aimed at stopping protected activity. In *Cloer v. Gynecology Clinic, Inc.*, 528 U.S. 1099, 120 S.Ct. 862, 145 L.Ed.2d 708 (2000), Justices Scalia and

Thomas dissented from denial of certiorari, where the South Carolina Supreme Court upheld a finding of civil conspiracy where there was no unlawful activity when the goal of picketing was to discourage women from patronizing an abortion clinic, saying they would grant certiorari "to consider the constitutionality of a novel civil-conspiracy doctrine that places routine, lawful First Amendment activity under threat of financial liability, and probably under threat of injunction, throughout the State of South Carolina," 120 S.Ct. at 864.

In *Nike, Inc. v. Kasky*, 539 U.S. 654, 123 S.Ct. 2554, 156 L.Ed.2d 580 (2003), Justices Stevens and Ginsburg (joined by Justice Souter as to this section) agreed with dismissing a writ of certiorari, in part because of the importance of the novel issue presented, saying:

> This case presents novel First Amendment questions because the speech at issue represents a blending of commercial speech, noncommercial speech and debate on an issue of public importance. .... Knowledgeable persons should be free to participate in such debate without fear of unfair reprisal. The interest in protecting such participants from the chilling effect of the prospect of expensive litigation is therefore also a matter of great importance.

539 U.S. at 663, 123 S.Ct. at 2558-2559. See also *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 611, 123 S.Ct. 1829, 1836, 155 L.Ed.2d 793 (2003) (noting Illinois Supreme Court's

statement that the threatened exposure to litigation costs and penalties could produce a substantial chilling effect).

Statement of notifications per Rule 29:

Pursuant to Rule 29.4(a), a copy of this petition is being mailed to the Solicitor General of the United States.

Pursuant to Rule 29.4(c), a copy of this petition is being mailed to the Attorney General of Nebraska.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED IN THE CASE

First Amendment of the United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances

Fifth Amendment of the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness

against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation. (Emphasis added.)

Nebraska Revised Statutes, § 28-928. Mutilating a flag; penalty; flag, defined.

(1) A person commits the offense of mutilating a flag if such person intentionally casts contempt or ridicule upon a flag by mutilating, defacing, defiling, burning, or trampling upon such flag.

(2) Flag as used in this statute shall mean any flag, ensign, banner, standard, colors, or replica or representation thereof which is an official or commonly recognized symbol of the United States or the State of Nebraska.

(3) Mutilation of a flag is a Class III misdemeanor.

STATEMENT OF THE CASE

***Overview of the case*:**

This petition seeks relief from a jury verdict issued on October 31, 2007, in the United States District Court for the District of Maryland, and an order of judgment entered on the verdict on November 5, 2007, in the mount of $10.9 million ($2.9 million compensatory, $8 million punitive), against a small Old School Baptist Church, its pastor, and two of its members, because they engaged in lawful peaceful picketing over a thousand feet from a church for 30 minutes before a funeral began, and made statements in the media and on a passive Internet Web page about the soldier and his funeral. Liability was based on the torts of intentional infliction of emotional distress and invasion of privacy by intrusion upon seclusion, as well as civil conspiracy.

This petition also seeks relief from pending criminal charges in Sarpy County, Nebraska, where petitioner Phelps-Roper has been charged under Nebraska's flag mutilation statute (as well as three other statutes), all because during a picket one of Phelps-Roper's minor sons stood on an American flag. Petitioners ask that the Court find the Nebraska flag mutilation statute unconstitutional, and enjoin and prohibit any further prosecution of Phelps-Roper under that law, or under any other law for standing on the flag as part of a religious demonstration and expression, and specifically enjoin further prosecution of the two pending criminal cases in Sarpy County, Nebraska.

Where/how were the federal questions raised below?

In the federal court case, the First Amendment issues were raised multiple times, including:

Motion to dismiss by WBC and Phelps filed 9/18/06, with reply of 10/19/06, see 2006 WL 4927391 and 4927393; see order denying at 2006 WL 3081106;

Motion to dismiss or for summary judgment by Phelps-Davis and Phelps-Roper filed 4/24/07, with reply of 5/23/07, see 2007 WL 3120849 and 2007 WL 3120820; see order denying at 2007 WL 3120849;

Renewed motions for summary judgment by all defendants on 9/4/2007;

Response in opposition to a motion in limine by plaintiff to disallow a First Amendment defense, filed by defendants on 10/15/07, see 2007 WL 3120862;

Additional authorities in support of summary judgment filed 10/15/07;

Motion to clarify and renewed motion for summary judgment filed 10/19/07,

Motion to reconsider and standing objection filed 10/23/07, see 2007 WL 3120864;

Oral motions for judgment as a matter of law on 10/25/ and 10/29/07;

Oral objections to proposed jury instructions on 10/29/07; and,

Post trial motions filed 11/8/07.

The issues related to punitive damages were raised in objections to jury instructions on 10/29/07, and in post-trial motions filed 11/8/07.

In the state court cases, petitioner Phelps-Roper has raised the constitutional issues in pending motions to dismiss and for bill of particulars.

Basis for jurisdiction in the court of first instance:

Jurisdiction in the federal court case was based on diversity, per 28 U.S.C.A. § 1332.

In the state court case, state laws are prosecuted before county courts.

REASONS THE WRIT SHOULD BE ALLOWED

Background

References will be made to events during the trial in the federal court case. A full transcript has been ordered; references here are based on the best memory of petitioners and their counsel, who will defer to the record when it is available.

Petitioners are an Old School Baptist Church, believing and practicing doctrines of Calvinism (also called "T.U.L.I.P." doctrines[3]) since 1955, as well as the pastor of the church, and two members. They will be referred to as WBC (the church), Phelps (the pastor), Phelps-Davis and Phelps-Roper (members).

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[3] The core doctrines are reflected in this acronym, to wit, total depravity, unconditional election, limited atonement, irresistible grace and perseverance of the saints.

In 1990 petitioners began picketing regarding primarily homosexuality, because of activity at a local nearby park. With time the picketing expanded, geographically and topically. The picketing has continued daily since then. In the early years, petitioners picketed at "gay" events, church events, government-sponsored events, and other large gatherings (such as political events, parades, shows, etc.). Petitioners spent many years on the streets warning the nation to stop sinning or they would incur the wrath of God.

With time, it is petitioners' belief that the mores and policies of America grew worse, more sinful, and more contrary to the Scriptures. Petitioners believe that the calamities that have befallen America are the direct result of her policies enabling, endorsing, engaging in and being proud of sin, including fornication, adultery, abortion, greed, idolatry and homosexuality.

Core themes of petitioners' religious belief are reflected on signs such as God Hates Fags, God Hates Fag Enablers, Fags Doom Nations, You're Going to Hell and God Hates You. Discussion about several of the signs can be found at www.signmovies.net, and various details of petitioners' message can be found at www.godhatesamerica.com and www.godhatesfags.com.

Increasingly petitioners' message has become less popular, and today it is safe to say that 99.9% of the population – in America and probably in the world – fully reject, and even hate, the message. Petitioners believe this is consistent with many passages in the

Scriptures that forewarn that in the Last of All Days the content of the Bible would be rejected broadly and wholesale.

Petitioners do not solicit or take donations; and they use their personal incomes to finance their travels for picketing. For the first 5-6 years the picketing was predominantly in Topeka and Kansas, where the church is located. In 1996, following a story aired by ABC's *20/20*, the picketing moved to a national arena, so today over 33,000 pickets have been done, in every state of the union.

Petitioners pattern themselves after what they read about the prophets, apostles and Christ himself, in that they publish a message. The goal, in other words, is to publish, not convert. Petitioners believe that their experience will be comparable to the experiences of the prophets and apostles, in that they will warn a doomed society to obey; that society will reject the warning; and that society will be doomed (like Noah did with the pre-Flood world; Lot did with Sodom; Jeremiah did with ancient Israel; and Christ did with the remnant of Judah).

In 2003 America entered the war in Iraq. Shortly, soldiers began dying, and funerals being held back home in America. For two years petitioners observed that these funerals turned into large public events, heavily attended by military representatives, politicians and members of the community. The funerals were heavily covered by the media. A good example of how public these soldiers' funerals became is seen in the opinion of the Tenth Circuit Court of Appeals in *Showler v. Harper's Magazine*

Foundation, 2007 WL 867188 (10th Cir. 2007), where the court upheld summary judgment on tort claims where a photographer went into a soldier's funeral in Oklahoma, took pictures of the soldier's body in the casket, and made some of them part of an income-producing photo essay.

As petitioners watched these funerals become more public, and the event of the funeral used to demand, "God bless America," and to praise the nation, the military and the soldiers; they concluded they had a Scriptural duty to speak on the very public topic of the soldiers' funerals.

Beginning in June 2005, two years into the war, petitioners began picketing in connection with the soldiers' funerals. Church members routinely stood a distance from the building (church, high school, funeral home, etc.), on public right of ways (where they *always* picket, never on private property, never civil disobedience), picketing before the funeral started, leaving when it began. Nearly always when petitioners picket these events, there are others present outside, including the Patriot Guard riders (a group over 100,000 strong who picket to show respect and to "protect" at the soldiers' funerals, holding flags, riding motorcycles with engine revving when permitted, etc.; they say in response to petitioners, see www.patriotguard.org), military members, citizens, police officers, firefighters, etc.

Everyone in the world is talking about the soldiers' funerals. Almost everyone is saying they are heroes, and is promoting "God loves everybody" and "he's a hero" themes in connection with the funerals.

(Some people also decry the war in connection with the deaths of soldiers.) The question of what is happening to these soldiers is uppermost on everyone's mind. Petitioners genuinely and sincerely believe, from the Scriptures, that they are dying because of the proud sin of America. They have made signs reflecting this fact, such as God Hates America, America is Doomed, God is Your Enemy, God Hates Your Tears, Fag Troops, Semper Fi Fags and Not Blessed, Just Cursed. Petitioners also believe from the Scriptures that every judgment of God is righteous, and that every human has a duty to thank God *always* for His righteous judgments. Petitioners express this religious view in such signs as Thank God for Dead Soldiers, Thank God for IEDs, Thanks God for 911, Thank God for Katrina, Thank God for Calif. Fires, and most recently, Thank God for $10.9M.

Against this backdrop, on March 10, 2006, three members of the church – the individual petitioners here – and four minor children of Phelps-Roper, traveled to Westminster, Maryland, and picketed for 30-40 minutes over 1000 feet from the church where a soldier's funeral was being held, leaving when it was time for the funeral to begin.

Before the funeral there was substantial media coverage, in the week from the soldier's death on March 3 up to the date of the funeral a week later. Media heavily attended the funeral. Many stories were written about the funeral itself, and stories about the soldier, his family and the funeral were published shortly after the funeral.

Patriot Guard riders attended the funeral. School children from the church school came out to participate, with their own signs. The church was able to hold 1200 and it was packed. Strangers attended. The date, time and location of the funeral were published in several local papers, and the Patriot Guard riders posted the information on their Web page. After the funeral was over, a 15-mile procession to the burial was filled with citizens, police and firefighters, with flags, signs and salutes.

While picketing, petitioners talked to members of the media, and some of their statements appeared in some of the news stories. The soldier's father – the plaintiff in the federal court case – chose to read and watch the news items.

About five weeks after the funeral, petitioner Phelps-Roper wrote a religious statement about the funeral, and the soldier's family (based on information published in the media, such as the fact that his parents were divorced and he was raised in the Catholic Church). The document – called "an epic" – was published on a passive Web site, www.godhatesfags.com. The document expressed the religious opinion that the soldier was not raised in a Scriptural manner; that the things he was taught wrong (such as divorce and Catholicism) contributed to his death; and that he died because of the sins of America. The epic is written in very strong language and has many Bible quotes and Bible sentiments. Some time after the epic was posted on the passive Web site, doing a Google search about his son, plaintiff found the epic, read it, and shared it with his daughters and sisters.

During the picket, petitioners were out of sight and sound of those going to the funeral. Not only were they over a thousand feet away, they were down a steep hill from the entrance used by the funeral procession. (Plaintiff said he saw some of the signs, not the people, but couldn't read them. Video footage of the funeral procession route, and the place where petitioners stood, puts that in doubt. Please see *Scott v. Harris*, ----U.S.----, 127 S.Ct. 1769, ----L.Ed.2d----, 2007 WL 1237851 [2007].)

On June 5, 2006, the father of the soldier sued petitioners in federal court in Maryland, on diversity jurisdiction, alleging intentional infliction of emotional distress, defamation, invasion of privacy by publication of public facts, invasion of privacy by intrusion upon seclusion, and civil conspiracy.

Before trial, the trial court granted summary judgment on defamation claims, because the statements on the signs and in the epic were statements of opinion; and on the invasion of privacy by publication of private facts, because anything addressed by petitioners about plaintiff or his son were taken from public information in the media.

The case went to trial October 22, 2007, and a verdict was issued on October 31, 2007, in the amount of $10.9 million, $8 million in punitive damages.

Preliminary and final instructions to the jury on First Amendment issues are found in the Appendix hereto.

The trial was very content-based, focusing on content of signs, epic, and statements to the media, and expanding to the overall beliefs of petitioners, often in a mocking or derisive tone. For instance, plaintiff's counsel questioned petitioners about their belief that only a remnant of mankind are God's elect and will go to heaven (the doctrine of limited atonement), with words to the effect of, "I think I'm understand; only the people in *your* church go to heaven, or don't go to hell.," Later, the trial court made a comment to the effect that one of petitioners had testified that 99.9% of mankind is going to hell, and that would even include people in the courtroom.

The jury visibly responded to petitioners' religious beliefs during trial. During closing arguments, plaintiff's counsel mocked the religion of petitioners. After the compensatory damages award of $2.9 million (following a few hours of deliberation, during which the jury asked for a King James Version Bible, which the trial court declined), another round of arguments occurred on punitive damages. As an example of how focused that argument was on religion, at one point plaintiff's counsel said that petitioners claimed to be the prophets, watchers and seers (per their testimony), and he then inquired to the effect, "Who gives them the right," to make that claim. Various adjectives were used to describe petitioners' religious message, such as nasty, vicious and hateful. In a few minutes the jury returned with a punitive damages award of $8 million on October 31, 2007. On November 5, 2007, a judgment order was issued on the verdict (copy found at the Appendix).

Meanwhile, on June 5, 2006, petitioner Phelps-Roper participated in a picket in Bellevue, Nebraska. During the picket, for a few minutes, one of her minor sons stood on an American flag. Petitioners routinely use the American flag to express their religious viewpoint that God is cursing this nation; that this nation is in distress in its relationship with God, because of its sin; and that the symbols of this nation have become symbols of sin and rebellion against God.

After the boy had stopped standing on the flag, Bellevue police arrested Phelps-Roper, and ticketed her for violating Nebraska's flag mutilation statute. After Phelps-Roper was taken to jail, picketing by adult and minor church members continued for another 15-20 minutes, with law enforcement present. On July 5, 2007, the local county prosecutor filed two criminal cases, one under the Nebraska flag mutilation statute, and one for disturbing the peace, contributing to the delinquency of a minor, and negligent child abuse. The criminal complaints are found at the Appendix hereto.

Over 40 states have passed laws putting time, place and manner limits on petitioners' funeral picketing, and Congress has passed three separate acts on this topic, all of which place time, place and manner restrictions on funeral picketing, all of which petitioners obey.

I. THE LEVEL OF RESTRAINT ON SPEECH, RELIGIOUS PRACTICE AND EXPRESSION, IS SO SUBSTANTIAL, THE COURT SHOULD EXERCISE ITS AUTHORITY UNDER THE ALL WRITS ACT

This is a unique situation that involves an effort to use litigation to restrain speech and religious expression. Jurisdictions federal and state have balanced any competing interests there may be between the privacy of a funeral (the soldiers' funerals are very public events; the topic of dying soldiers is very public) and the right of petitioners to speak and engage in religious activity on public right of ways, which are traditional public fora. These provisions have not satisfied the public, because they hate the content of petitioners' message. The public does not expect soldiers' funerals to be private; they treat them as very public, and *the* occasion to address the topic of dying soldiers. Soldiers' funerals today are attended by virtual patriotic pep rallies.

The question comes down to this at its core: If citizens of this nation believe that this country has crossed the line with God; that the wrath of God is pouring out on this nation; and that the *reason* the soldiers are dying is because of the proud, institutionalized sin of this nation, do they have the right to say that in connection with the soldiers dying? The expectation is that *everyone* will say "God bless America," and "the soldiers are heroes." And that *everyone* will be allowed, and even encouraged, to say those things in *direct connection to* the death of each individual soldier, in the news, at the funeral, outside the funeral, and in every public and

published statement about the soldiers. If petitioners disagree with that message, do they have the right to speak up on the same topic in the same public arenas with a competing message? If so, the courts should not be used as sausage grinders to render crippling verdicts for millions, or for criminal convictions, to restrain petitioners from publishing their views on the soldiers dying. The *only* basis for treating petitioners' words different from the words of everyone else on the topic of the soldiers' funerals is *content*. What is the legitimate interest of the government in silencing one viewpoint about the soldiers' deaths?

II. THE VERDICT IN THE FEDERAL COURT CASE VIOLATES THE FIRST AMENDMENT

A. The speech at issue is religious expression on public issues

Rulings by the trial court, questions during examination, and arguments to the jury were all about content. The basis for liability in this case was content. This places the government regulation at issue here under strict scrutiny.

The trial court avoided the non-content requirement by holding that because the case was a civil action, not criminal, the First Amended had less or no application. This Court has repeatedly indicated that a civil tort action is *the equivalent* of a statute, ordinance or injunction, as a government regulation. See *Cohen v. Cowles Media Company*, 501 U.S. 663, 668, 111 S.Ct. 2513, 2517-2518, 115 L.Ed.2d 586 (1991); *NAACP v. Claiborne Hardware*

Co., 458 U.S. 886, 916, fn 51, 102 S.Ct. 3409, 3427, 73 L.Ed.2d 1215 (1982) ("Although this is a civil lawsuit between private parties, the application of state rules of law by the Mississippi state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment. *New York Times v. Sullivan, supra,* at 265, 84 S.Ct. at 718.") Treating this case as not covered by the First Amendment, or the speech as having less protection under the First Amendment, because the form of the regulation is a civil tort action (vis-à-vis a criminal prosecution or injunction) is error as a matter of law.

B. The verdict is content-based

The verdict was based on content. The trial court's rulings permitted content to be the issue. Thus, as a content-based – instead of content-neutral – regulation, it is subject to the strictest scrutiny. That means the government interest must be compelling, and the regulation must be the most narrow possible. See, e.g., *Denver Area Educational Telecommunication Consortium, Inc. v. FCC*, 518 U.S. 727, 797-799, 116 S.Ct. 2374, 2412-2413, 135 L.Ed.2d 888 (1996); *RAV v. City of St. Paul, Minn.*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992).

Further, because the case also targeted religious speech and practices – above and beyond mere speech – the regulation this case imposes is subject to the strict scrutiny and narrowly tailored requirements for this further reason. See *Church of the Lukami Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

This case cannot survive the strict scrutiny analysis. The government must have a compelling government interest, and the regulation must be narrowly tailored to that specific government interest. Assuming for the sake of argument the government interest is in putting some buffer around the event of a funeral, the regulation in this case went well beyond doing so. Even if there is a compelling government interest in some privacy right during a funeral – no matter how public the event might be – that would lead only to a narrowly tailored limit on picketing near the funeral.

Maryland passed a law a funeral picketing law in October 2006. Maryland Code, Art. 10, § 205 regulates funeral picketing, including any obstruction, hindering, impeding or blocking of a person's entry to or exit from a funeral; addressing speech to a person attending which would produce an imminent breach of the peace; and picketing within 100 feet. This reflects the government interest in buffering funerals.

The government does not have a legitimate interest in prohibiting any words, in any manner, at any time, at any place, which are deemed highly unpopular, just because those words are in connection with soldiers' deaths, and are words that enrage. The "God bless America" and "soldiers are all heroes" messages don't *need* First Amendment protection. Almost everyone loves those words. Petitioners' message is the message that needs protection at this hour.

C. The verdict constitutes a regulation by government that is overbroad and/or unduly vague, going beyond a reasonable time, place and manner restriction

In at least two ways the trial court failed to limit the government regulation reflected in the civil tort action to a reasonable time, place and manner: First, the manner in which the Court permitted the case to go to the jury eliminated any reasonable time, place and manner restriction. Second, the instructions to the jury effectively eliminated any reasonable time, place and manner restriction.

Any restriction on speech must be a reasonable time, place and manner restriction; that is content-neutral; narrowly tailored to serve a significant government interest; that leaves open ample alternative channels to communication of the information. See, e.g., *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 175-176, 122 S.Ct. 2080, 2093, 153 L.Ed.2d 205 (2002); *Hill v. Colorado*, 530 U.S. 703, 722, fn 30, 120 S.Ct. 2480, 2492, 147 L.Ed.2d 577 (2000).

The trial court declined to limit what information went to the jury, or further define what part of petitioners' speech was actionable. Although at times during oral argument the trial court suggested some of the signs, such as Pope in Hell and America is Doomed, were not actionable. However, the trial court held that all of the signs could be submitted to the jury; as well as all the words of the epic and all the words by petitioners to the media.

During argument on October 15, 2007, the trial court said the distance did not really matter; and that if plaintiff could reasonably have believed any of the signs were targeted to him or his son, those signs could be actionable.

The trial court initially said the time period during which words could be actionable would be from the date of the soldier's death to a few days after the funeral. Upon being reminded that the epic was written several *weeks* after the funeral, the trial court promptly changed the time period to the date of the epic.

Quite simply, the trial court ruled that the time was from death to several weeks after; the place was no place that could by any avenue reach the eyes or ears of plaintiff; and the manner was no manner (no sign, no talking to the media, no words on the Internet) The limits were not content-neutral; and not narrowly to a significant government interest; nor did they leave open *any* alternative channel for communication of the information. If petitioners desire to publish their views about the dying soldiers, there is no channel for doing so, without facing liability in the form of a huge emotional jury verdict.

Also during argument on October 15, 2007, the trial court suggested that petitioners may have contrived the *meaning* of the signs after the suit was filed. Thus, during trial, not only was it necessary for petitioners to explain the theological meaning of all their words on the signs, to the media, and in the epic

– but it was also necessary for them to demonstrate they held those views before the lawsuit was filed.

Further, the instructions to the jury resulted in elimination of a reasonable time, place, manner restriction, and allowed the jury to find liability based on any language it found offensive. The trial court instructed the jury, in both preliminary and final instructions, that speech that is vulgar, offensive or shocking, is unprotected. This language – "vulgar," "offensive" or "shocking" -- comes from *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). The language of the *FCC* case does not apply, because it pertained to broadcasting. The First Amendment has "special meaning" in the broadcasting context, because children have ready unsupervised access;, radio receivers go into the home; and non-consenting adults may tune in to a station without any warning that offensive language is being or will be broadcast. Further, the Court noted that the speech at issue there had no political or social value reflected in the record of the case.

Also as to "offensive" speech, this Court very recently said:

> Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly "offensive" .... We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of "offensive." After all, much political and religious speech might be perceived as offensive to some. ....

Morse v. Frederick, ---- U.S. ----, 127 S.Ct. 2618, 2629 (2007).

Using the language "vulgar," "offensive" or "shocking" in preliminary and final instructions was highly prejudicial, and coupled with the language of the elements of the torts ("highly offensive" for intrusion upon seclusion; "extreme and outrageous" for intentional infliction of emotional distress) led the jury to believe if the language was offensive, it was actionable. This was compounded by the intensity of the attack on petitioners' religious beliefs throughout the trial, and the fact that the religious message petitioners publish is highly unpopular. Even though the trial court did include language that "hate" speech is not unprotected, and restrictions on speech require a reasonable time, place and manner restriction – in the *closing* instructions – that language got lost, because of the strong opening language, the continued use of the vulgar, offensive and shocking language, and the religious hostility that pervaded the proceedings.

D. The verdict established the religion of "God loves everybody/American patriotism" over petitioners' religion

If a fact finder must determine which doctrine is accurate to decide liability, the case should not be allowed. The record from the trial in this case contains numerous references to doctrinal issues, and arguments to the jury in closing included condemnation of petitioners' doctrine.

The courts do not have jurisdiction to decide whose religion is correct. See *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 116, 73 S.Ct. 143, 154, 97 L.Ed. 120 (1952) (Free Exercise Clause protects the power of religious organizations "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine").

Concerns of excessive entanglement by the government in church affairs arise in the context of a church employee bringing employment discrimination claims, e.g., *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002); *Montrose Christian School Corp. v. Walsh*, 363 Md. 565, 770 A.2d 111 (Md. 2001); of litigation against churches for sexual abuse by church staff, e.g., *JC2 v. Grammond*, 232 F.Supp.2d 1166 (D.Or. 2002); or of disputes over property belonging to the church, e.g., *In re Roman Catholic Archbishop of Portland in Oregon*, 335 B.R. 842 (Bkrtcy.D.Or. 2005). Courts must decide whether, in order to decide the case, they have to involve themselves in determining doctrinal issues. If so, the case is not allowed to go forward, because for courts to decide doctrinal issues is a violation of the First Amendment.

In *Dixon v. Edwards*, 290 F.3d 699, 715 (4th Cir. 2002), the court said: "The Court has consistently recognized that First Amendment values are jeopardized when church litigation turns on the resolution by civil courts of controversies over religious doctrine and practice."

In *United Sates v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972), the court reversed convictions for disorderly conduct, resulting from leafleting and prayer on government property, because there was a strong suggestion that the regulation was being enforced selectively, based on the content of the viewpoint being expressed, "to inhibit the expression of an unpopular viewpoint," *id.* "It is established beyond all argument that the government may not favor one religion over another. It may not choose to permit an Episcopal prayer service for the health of the President and in support of the Armed Forces and deny a Quaker (or Episcopal) prayer service to end all war or even the Vietnam War. It may no more dictate the content of a religious service than it may establish a state religion." 456 F.2d at 1079.

The jury was allowed to be the arbiter of doctrinal issues, which constitutes excessive entanglement; and the verdict amounts to the establishment of a religion. See, e.g., *Harwig v. Albertus Magnus College*, 93 F.Supp.2d 200 (D.Conn. 2000) (defamation claim cannot proceed if resolving it requires court to resolve doctrinal issue) *Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F.Supp.2d 732 (D.N.J. 1999) (if court has to inquire into areas of clear ecclesiastical concern that would involve questions of religious doctrine, defamation claim not allowed); *McNair v. Worldwide Church of God*, 197 Cal.App.3d 363, 242 Cal.Rptr. 823 (Cal.App. 1987) (judgment for former church member for libel, slander and intentional infliction of emotional distress reversed because two ministers and church were not shown to have "constitutional malice" when speaking about divorce).

The jury was allowed to decide whether the "God bless America," or "God is cursing America" religious viewpoint is accurate, which is not the proper role of a jury.

E. The trial court did not do the required analysis to determine whether the subject of petitioners' speech was private or public

Several times on the record the trial court referred to this Court's opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761, 105 S.Ct. 2939, 2946-2947, 86 L.Ed.2d 593(1985), where the Court said:

> The only remaining issue is whether petitioner's credit report involved a matter of public concern. In a related context, we have held that "[w]hether ... speech addresses a matter of public concern must be determined by content, form, and context ... as revealed by the whole record." *Connick v. Myers, supra*, 461 U.S. at 147-148, 103 S.Ct. at 1690. These factors indicate that petitioner's credit report concerns no public issue. [FN8]
>
> [FN8] The dissent suggests that our holding today leaves all credit reporting subject to reduced First Amendment protection. This is incorrect. The protection to be accorded a particular credit report depends on whether the report's "content, form, and context" indicate that it concerns a public matter.

There is no legal basis for saying that soldiers' funerals or the topic of dying soldiers, are *per* se private. Applying the test in *Dun & Bradstreet* to the facts of this case, it becomes clear that the speech at issue in this case was public, not private.

Looking at the content of the speech, the core message is that God in His righteous judgment is killing the soldiers of this country because of its sin, which is religious viewpoint on a public topic. The signs at the picket had religious content.[1] Petitioners' words addressed how God is dealing with this nation; why the soldiers are dying; the Scriptural consequence of divorce; and the Catholic Church priest sex scandal. All of these topics are of great public concern.

The form of the speech is assembly on public fora (public streets are "quintessential public forums," *Frisby v. Schultz*, 487 U.S. 474, 480, 108 S.Ct. 2495, 101 L.Ed.2d 420 [1988]), in the form of picketing; comments to the media; and posting a document on a passive Web site on the Internet. These are all forms of speech to which the law gives lots of protection.

The context of the speech was a highly public death of a soldier, and funeral of that soldier. The

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[1] The signs at the picket were: Don't Pray for the USA; God Hates Fags; God Hates You; God Hates America; God's View/Not Blessed Just Cursed; Pope in Hell; God Hates the USA; You're Going to Hell; Fag Troops; Thank God for Dead Soldiers; Thank God for IEDs; Priests Rape Boys.

funeral was published in several local newspapers; the media was covering the soldier's death and funeral; the public turned out in large numbers; all against a backdrop of thousands of soldiers dying, and hundreds of very public funerals.

There is no basis in fact or law for treating the speech at issue in this case as private, and on that basis instructing the jury that private speech had less or no protection.

F. The verdict on civil conspiracy violated petitioners' right of association

Through the civil conspiracy claim, the First Amendment right of association was further violated. The principle of law that comes from *NAACP v. Claiborne Hardware Co., supra,* is that the First Amendment forbids liability for members of a group who come together to engage in protected activity – even if some of the members engage in unlawful violence. Holding all petitioners liable because they came together for protected activity violates the Free Association clause of the First Amendment. This is another example of where the passion, prejudice and bias of the jury are manifest. Even though different petitioners had different roles in the events, identical amounts were awarded against each in the verdict. Even if, for the sake of argument only, Phelps-Roper did something unlawful in writing her epic, the civil conspiracy theory wrongfully applied in this case allowed the jury to award equal damages against all

for the one person's actions. This is the byproduct of turning over protected speech which is unpopular to an inflamed jury.

III. THE VERDICT IN THE FEDERAL COURT CASE VIOLATES DUE PROCESS

A. The verdict's amount reflects that it is the product of extreme passion and prejudice

The amount of the verdict reflects that it is the product of extreme passion and prejudice. The errors of law surrounding the First Amendment culminated in this excessive impassioned verdict. The instructions given to the jury did not provide sufficient standards to prevent this runaway jury verdict.

This Court has held that a person has a right not to be subjected to excessive punitive damages awards as a matter of due process. See *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); and *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).

B. Maryland law lacks sufficient standards to prevent excessive punitive damages awards; or the jury wasn't instructed in or didn't follow the standards

This Court requires standards to award punitive damages, and to review awards de novo after the fact, e.g., *Pacific Mutual Life Insurance Co., supra.* Maryland law has some standards, which if applied to this verdict, show it was excessive, was the product of passion, and violates principles of due process.

There are some standards in Maryland, which were not followed here. For instance, reference to religion to inflame the passions of the jury is improper and prejudicial. See *Tierco Maryland, Inc. v. Williams*, 381 Md. 378, 410-412, 849 A.2d 504, 523-524 (2004).

Punitive damages have to be supportable under the facts (Maryland Code, Art. 10, § 913), and actual malice must be shown. There is no evidence petitioners acted with any malice, and instead acted pursuant to their beliefs about how to serve God and admonish mankind to obey God.

Punitive damages must not be disproportionate to the gravity of the defendants' wrong. *Bowden v. Caldor, Inc.*, 350 Md. 4, 710 A.2d 267, 278 (1998). The only way you get to *any* wrong, let alone grave wrong, is by disagreement with the content of religious viewpoint.

Punitive damages must not be disproportionate to the defendants' ability to pay, and are not supposed to bankrupt or impoverish defendants. 710 A.2d at 278-279. The evidence shows that petitioners' combined net worth is well under $1 million. Once the compensatory damages award exceeded this figure, seeing how inflamed the jury was, punitive damages should not have been given to the jury to decide.

Consideration of criminal penalties for similar behavior should be considered. 710 A.2d at 279-280. The Maryland funeral picketing law imposes a criminal fine of $1,000. The jury's verdict of $8 million in punitive damages is 1,142.8 times $7,000, the fine for seven picketers (if they'd broken that law, which they didn't).

Comparison should be made to other punitive damages awards. 710 A.2d at 280-281. "[A] multi-million dollar award of punitive damages is entirely beyond the range of punitive damages awards previously upheld by this Court." 710 A.2d at 281.

Punitive damages should not be increased because of separate torts for one occurrence or episode. 710 A.2d at 282. The jury was given a verdict form that allowed them to pile on in their passion.

The reasonable costs and fees should be considered to provide "one fairly definite factor which they may take into account in fixing the amount' of punitive damages," 710 A.2d at 283. Plaintiff has solicited and received funds for costs and his

attorneys have stated publicly they are working pro bono.

The ratio of punitive damages to compensatory damages should be considered. Using the statutory cap of $350,000, the punitive damages of $8 million is 22.8 times the amount of compensatory damages.

The instructions, and standards in Maryland, did not provide adequate protection against an excessive verdict, the product of extreme passion, prejudice and religious bias; unsupported by the evidence or any actual injury; violating due process.

C. The verdict could have been – and probably was – based on alleged injury to nonparties

In addition to violating due process because of its excessiveness, the jury could have – and probably did – consider alleged harm to others and/or other matters beyond what injury plaintiff allegedly experienced. All of petitioners' religious beliefs were on trial; in closing argument for punitive damages counsel argued that this was a case that pitted 300 million Americans against the 70 members of WBC. The jury was free to award damages for any of petitioners' beliefs, words, or pickets, well beyond any injury plaintiff actually may have suffered. This violated due process. See *Philip Morris USA v. Williams*, ---- U.S. ----, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007).

D. The amount of compensatory damages violated Maryland's statutory cap and lacked any evidentiary basis

The amount of compensatory damages awarded violates the statutory cap under Maryland law for noneconomic damages of $350,000. See Maryland Code, Art. 11, § 108. Plaintiff did not claim any economic injury; instead, he has only claimed an indefinable emotional injury and exacerbation of diabetes. Thus, the amount of compensatory damages, even if remitted to the $350,000 statutory cap, is not warranted by the evidence.

IV. THE NEBRASKA FLAG MUTILATION LAW IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED

A. The Nebraska flag mutilation law is unconstitutional on its face

Neb. Rev. Stat. § 28-928 impermissibly prohibits the constitutionally protected expression of mutilating a flag. Under this law, criminal liability hinges on whether the actor "intentionally casts contempt or ridicule upon a flag," § 28-928(1), thereby making the statute a viewpoint-based restriction. Such a restriction, reviewed with strict scrutiny, must be struck down as unconstitutional on its face.

Since the legislature passed this statute in 1977, this Court has twice held that expressive flag mutilation is a form of communicative conduct protected by the First Amendment. *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989);

United States v. Eichman, 496 U.S. 310, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990). The determination of expressiveness rests upon an inquiry into whether "[a]n intent to convey a particularized message was present, and ... [whether] the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11, 94 S.Ct. 2727, 2730, 41 L.Ed.2d 842 (1974). This Court "ha[s] had little difficulty identifying an expressive element in conduct relating to flags ..." Id. at 405.

B. The Nebraska flag mutilation law is unconstitutional as applied

In the alternative, the statute is unconstitutional as applied to this case, in which constitutionally protected expressive conduct was proscribed. As in *Texas v. Johnson*, *supra*, and *United States v. Eichman*, *supra*, this Court should recognize the absence of a compelling state interest and narrow tailoring within this statute and quash this charge.

V. THE STATE CASES ON OTHER CHARGES VIOLATE THE FIRST AMENDMENT

A. The application of other statutes to protected activity fails because it is all based on the act of standing on the flag

The application of other state laws to the same conduct is also unconstitutional, including charges of contributing to the delinquency of a minor under Neb. Rev. Stat. § 28-709, disturbing

the peace under Neb. Rev. Stat. § 28-1322, and child abuse under Neb. Rev. Stat. § 28-707. No evidence suggests that Phelps-Roper acted outside the bounds of her First Amendment rights at any time. Those charges relate exclusively to the constitutionally-protected action of using the flag to express an opinion; thus these charges suffer from the same constitutional defects as the flag desecration charges.

The disturbing-the-peace statute is facially unconstitutional and unconstitutional as applied, because it is not limited to fighting words (by its language or its construction by the Nebraska Supreme Court); and it is being applied to punish words which cannot be punished, especially given that no breach of any kind actually occurred.

Further, applying statutes related to delinquency of a minor and child abuse to a parent because she exercises her right to raise her child by involving him in her religious expression and activity is a violation of the Fourteenth Amendment's substantive due process rights.

CONCLUSION

The verdict in the federal court case reflects the popular viewpoint that God is blessing America, that the dying soldiers are heroes, and that God loves everybody so no one goes to hell. These viewpoints are often expressed by various Americans in very public ways directly in connection with the deaths and funerals of soldiers. Petitioners disagree with this viewpoint, and instead hold the religious belief

that God is punishing this nation, the soldiers are dying for the nation's sins, and God sends many people to hell, especially those who disobey Him proudly. Petitioners expressed these religious views in the same public arenas used by others. The verdict is a content-based overbroad and unduly vague regulation of protected religious speech, activity and expression. The movement to use this crippling verdict and multiply litigation and similar impassioned verdicts is a prior restraint and should be prohibited.

Similarly, the criminal charges in the state court case rest upon a statute which criminalizes expressive use of the flag. Using the flag to express aspects of their religious viewpoints is a key piece of petitioners' religious speech, activity and expression. The flag statute is contrary to this Court's rulings about use of the flag for expressive use, where the Court specifically ruled that the fact mutilating (including burning) the flag makes people angry is not a sufficient basis for punishing and prohibiting the speech. The Nebraska state court cases are further efforts to restrain petitioners' speech by expanded litigation, and as such should be prohibited.

In the federal court case, this Court should issue the writ of mandamus and prohibition, enjoining and prohibiting any further enforcement of or execution on the verdict of October 31, 2007 and the judgment of November 5, 2007.

In the state court cases, this Court should issue the writ of mandamus and prohibition, find the

Nebraska flag mutilation law unconstitutional, and enjoin and prohibit further prosecution.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALBERT SNYDER, *

Plaintiff, *

v. **Civil Action No.: RDB-06-1389**
*

FRED W. PHELPS, SR., et al.,

Defendants. *

* * * * * * * * * * * * * * * * * * *

PRELIMINARY INSTRUCTIONS

Members of the jury, we now begin the trial of the case that you heard about during the process of jury selection. At the close of the evidence in this case, I will thoroughly explain the elements of the claims that the Plaintiff has brought against the Defendants. Before the trial begins, however, there are certain instructions you should have in order to better understand the case which is to be presented to you. At the conclusion of the case, I will instruct you on the law as it applies in this case. If anything I say then differs from anything I say now, what I say at the close of the case controls. Your job will be to apply the law as I explain it to you to the facts of the case as you determine them to be. You are the sole judges of the facts, and nothing I say or do not say

should influence your decision as to what those facts are. After your deliberations, you will return a verdict. You may have noticed that only 9 jurors were selected. In civil cases in federal court, fewer than 12 people may sit on juries for civil actions.

Overview of the Case

As I indicated before jury selection began, this is a lawsuit brought by the Plaintiff, Albert Snyder, against Westboro Baptist Church, Inc., its pastor Fred W. Phelps, Sr., and his daughters Shirley Phelps-Roper and Rebekah Phelps-Davis. Plaintiff contends that the Defendants intruded upon his seclusion and intentionally inflicted emotional distress upon him and conspired to commit these acts when they picketed with signs at the funeral of his son, Lance Cpl. Matthew Snyder, who was killed in Iraq, and them posted an account of their actions on the website of the Westboro Baptist Church, Inc. Defendants contend that they were exercising their First Amendment rights to express their religious beliefs and opinions.

With respect to the claims of the Plaintiff, the elements of the first claim for intrusion upon seclusion are:

An intentional intrusion upon another person's solitude, seclusion, private affairs or concerns in a manner which would be highly offensive to a reasonable person.

The elements of the second claim for intentional infliction of emotional distress are:

(1) that the defendants' conduct was intentional or reckless;

(2) that the conduct was extreme and outrageous;

(3) that the conduct caused emotional distress to the plaintiff; and

(4) that the emotional distress was severe.

The elements of the third claim for civil conspiracy are:

An agreement by at least two persons to accomplish an unlawful act or to use unlawful means to accomplish an act not in itself illegal, and that the act or means used resulted in damage to the plaintiff.

With respect to the defense of the Defendants, the First Amendment of the United States Constitution provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]; or abridging the freedom of speech." The United States Supreme Court has long recognized that "not all speech is of equal First Amendment protection." As a general matter, "the fact that society may find speech offensive is not a sufficient reason for suppressing it." However, speech that is "'vulgar', 'offensive', and 'shocking' is not entitled to absolute constitutional protection under all circumstances." As to the particular subject matter of the speech, a distinction has been drawn between matters of public and private concern. Where the speech is directed at private people and matters of private concern, the Supreme Court has held that the First Amendment interest in protecting particular types of speech must be balanced against a state's interest in protecting its residents from wrongful injury.

You as the judges of the facts in this case must essentially determine whether the Defendant's actions would be highly offensive to a reasonable person, whether they were extreme and outrageous, and whether these actions were so offensive and shocking as to not be entitled to First Amendment protection.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALBERT SNYDER,	:	
Plaintiff,	:	**Case No. RDB-06-1389**
	:	
v.	:	
	:	
FRED W. PHELPS, SR., et al.,		
Defendants.		

JURY INSTRUCTIONS

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COURT'S INSTRUCTION NO. 21
(First Amendment Defense)

The Defendants in this case claim that their actions were protected by the First Amendment of the United States Constitution, which provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]; or abridging the freedom of speech." The Defendants have the right under the First Amendment to engage in picketing, and to publish their religious message, no matter how much you may disagree with that message. The First Amendment applies to actions at the state and local level through the Fourteenth Amendment.

As a general matter, "the fact that society may find speech offensive is not a sufficient reason for suppressing it." Speech that is called "hateful", or speech that is unpopular, or speech with which you strongly disagree, may still be protected speech. The government, including the courts, can place reasonable time, place and manner restrictions on

how protected speech may be expressed. These restrictions must be narrowly tailored, and should balance the interests of all people involved. However, speech that is "'vulgar', 'offensive', and 'shocking' . . . is not entitled to absolute constitutional protection under all circumstances."

The United States Supreme Court has long recognized that "not all speech is of equal First Amendment protection." When speech gives rise to civil tort liability, the level of First Amendment protection varies depending on the nature and subject matter of the speech.

As to the particular subject matter of the speech, a distinction has been drawn between matters of public and private concern. Where the speech is directed at private people and matters of private concern, the Supreme Court has held that the First Amendment interest in protecting particular types of speech must be balanced against the state's interest in protecting its residents from wrongful injury. You must balance the Defendants' expression of religious beliefs with another citizen's right to privacy and his or her right to be free from intentional, reckless, or extreme and outrageous conduct causing him or her severe emotional distress. As I have previously indicted to you at the start of this case, you as the judges of the facts in this case must essentially determine whether the Defendants' actions were directed specifically at the Snyder family. You must essentially determine whether those actions would be highly offensive to a reasonable person, whether they were extreme and outrageous and whether these actions were so offensive and shocking as to not be entitled to First Amendment protection.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALBERT SNYDER, *

Plaintiff, *

vi. **Civil Action No.: RDB-06-1389**
*

FRED W. PHELPS, SR., et al.,

Defendant. *

ORDER OF JUDGMENT

The jury having returned a verdict in favor of the Plaintiff, Albert Snyder, and against the Defendants, Fred W. Phelps, Sr., Westboro Baptist Church, Inc., Shirley L. Phelps-Roper and Rebekah A. Phelps-Davis on October 31, 2007, it is this 2nd day of November, 2007, HEREBY **ORDERED:**

1. Judgment is entered in favor of Plaintiff Albert Snyder against Defendants Fred W. Phelps Sr., Westboro Baptist Church, Inc., Shirley L. Phelps-Roper and Rebekah A. Phelps-Davis, in the amount of $ 2,900,000.00 (two million, nine hundred thousand dollars) in Compensatory Damages as to Counts II (Invasion of Privacy-Intrusion upon Seclusion), IV (Intentional Infliction of Emotional Distress), V (Civil Conspiracy) of the Amended Complaint.
2. a. Judgment is entered in favor of Plaintiff Albert Snyder against Defendant Fred Phelps, Sr., in the amount of $2,000,000 (two million dollars) in Punitive Damages consisting of

$1,500,000 (one million five hundred thousand dollars) as to Count II and $500,00 (five hundred thousand dollars) as to Count IV.

b. Judgment is entered in favor of Plaintiff Albert Snyder against Defendant Westboro Baptist Church in the amount of $2,000,000 (two million dollars) in Punitive Damages consisting of $1,500,000 (one million five hundred thousand dollars) as to Count II and $500,00 (five hundred thousand dollars) as to Count IV.

c. Judgment is entered in favor of Plaintiff Albert Snyder against Defendant Shirley L. Phelps-Roper in the amount of $2,000,000 (two million dollars) in Punitive Damages consisting of $1,500,000 (one million five hundred thousand dollars) as to Count II and $500,00 (five hundred thousand dollars) as to Count IV.

d. Judgment is entered in favor of Plaintiff Albert Snyder against Defendant Rebekah A. Phelps-Davis in the amount of $2,000,000 (two million dollars) in Punitive Damages consisting of $1,500,000 (one million five hundred thousand dollars) as to Count II and $500,00 (five hundred thousand dollars) as to Count IV.

3. Any and all prior rulings made by the Court disposing of any claims against any parties are incorporated by reference herein, and this Order shall be deemed to be a final judgment within the meaning of Fed. R. Civ. P. 58.

/s/_____

Richard D. Bennett
United States District
Judge

IN THE COUNTY COURT OF SARPY COUNTY, NEBRASKA

THE STATE OF NEBRASKA,	)	**DOC/PAGE**
	)	**CR07-5060**
Plaintiff,	)	
vs.	)	**CRIMINAL**
	)	**COMPLAINT**
SHIRLEY L. PHELPS-ROPER	)	
3640 SW Churchill	)	
Topeka, KS 66604	)	
	)	
Defendant.	)	

COMES NOW the undersigned County Attorney or his Deputy of Sarpy County, Nebraska, and for complaint against the above-named defendant gives the Court to understand and be informed that the above-named defendant, contrary to the form of the statutes in such cases, made and provided and against the peace and dignity of the State of Nebraska, violated the laws of the State of Nebraska, to-wit:

COUNT 1: MUTILATING A FLAG

On or about the 5th day of June, 2007, at or near Harvell & Fairfax, in Sarpy County, Nebraska, said Shirley L. Phelps-Roper, did intentionally cast contempt or ridicule upon a flag by mutilating, defacing, defiling, burning, or trampling upon such flag, in violation of Section 28-928, R.R.S. Nebraska. (CLASS III MISDEMEANOR)

/s/ _____

County Attorney/Deputy

STATE OF NEBRASKA)
) ss.
COUNTY OF SARPY)

Marc B. Delman, being first duly sworn, upon my oath says that I am the County Attorney or his Deputy in and for Sarpy County, Nebraska; that I have read and signed the above Criminal Complaint; that to the best of my information and belief the allegations and charges therein contained are true and correct.

/s/ _____
County Attorney/Deputy

SUBSCRIBED and SWORN to before me this 5 day of July, 2007.

DCN #115900047194

_____
Notary Public/Judge

IN THE COUNTY COURT OF SARPY COUNTY, NEBRASKA

THE STATE OF NEBRASKA,	)	**DOC/PAGE**
	)	**CR07-5061**
Plaintiff,	)	
vs.	)	**CRIMINAL**
	)	**COMPLAINT**
SHIRLEY L. PHELPS-ROPER	)	
3640 SW Churchill	)	
Topeka, KS 66604	)	
	)	
Defendant.	)	

COMES NOW the undersigned County Attorney or his Deputy of Sarpy County, Nebraska, and for complaint against the above-named defendant gives the Court to understand and be informed that the above-named defendant, contrary to the form of the statutes in such cases, made and provided and against the peace and dignity of the State of Nebraska, violated the laws of the State of Nebraska, to-wit:

COUNT 1: DISTURBING THE PEACE

On or about the 5th day of June, 2007, at or near Harvell & Fairfax, in Sarpy County, Nebraska, said Shirley L. Phelps-Roper, did then and there intentionally disturb the peace and quiet of , a person, family, or neighborhood, in violation of Section 28-1322, R.R.S. Nebraska. (CLASS III MISDEMEANOR)

COUNT 2: CONTRIBUTING TO THE DELINQUENCY OF A MINOR

On or about the 5th day of June, 2007, at or near Harvell & Fairfax, in Sarpy County, Nebraska, said

Shirley L. Phelps-Roper, did encourage, cause or contribute to the delinquency or need for special supervision of a child under eighteen years of age, so that such child became or will tend to become a delinquent child or a child in need of special supervision, in violation of Section 28-709, R.R.S. Nebraska. (CLASS I MISDEMEANOR)

COUNT 3: NEGLIGENT CHILD ABUSE

On or about the 5th day of June, 2007, at or near Harvell & Fairfax, in Sarpy County, Nebraska, said Shirley L. Phelps-Roper, did negligently cause or permit a minor child, to-wit: J.P., to be placed in a situation that endangered said child's life or health, cruelly confined or cruelly punished said child or deprived said child of necessary food, clothing, shelter or care; in violation of Section 28-707, R.R.S. Nebraska. (CLASS I MISDEMEANOR)

/s/ _____
County Attorney/Deputy

STATE OF NEBRASKA)
) ss.
COUNTY OF SARPY)

Marc B. Delman, being first duly sworn, upon my oath says that I am the County Attorney or his Deputy in and for Sarpy County, Nebraska; that I have read and signed the above Criminal Complaint; that to the best of my information and belief the allegations and charges therein contained are true and correct.

/s/ _____
County Attorney/Deputy

SUBSCRIBED and SWORN to before me this 5 day of July, 2007.

DCN #115900047194 /s/ _____
Notary Public/Judge